(2)

CF0000062147

IN THE HIGH COURT OF M.P. JUDICATURE AT JABALPUR

CRIMINAL APPEAL NO. 728 OF 1999

APPELLANT (In Jail) ... BABLU @ MAHESH JAIN, Son of Sawadeshi Jain, aged about 26 years, resident of Sadar Bazar, Bhatapara P.S. Bhatapara, District-Raipur, M.P.

8/6/99
K. Sharma
Advocate

Rlo. A.R.

VERSUS

RESPONDENT ... STATE OF MADHYA PRADESH, through Police Station Nevepara, District-Raipur, M.P.

With Annexures

CLERK
O/o. Advocate Genral
M.P. JABALPUR.

APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक CRA.No.1728/99 **सन् 200**

A.F.R.

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

DIVISION BENCH: -

HON'BLE MR. L.C. BHADOO AND
HON'BLE MR. V.K. SHRIVASTAVA, JJ.

8/9/2006

Shri S.L. Bajaj, counsel for the appellant.

Shri U.N.S. Deo, Additional Public Prosecutor with Shri G.D. Vasvani, Govt. Advocate for the State/respondent.

Oral Judgment dictated on *Dais*.

PER L.C. BHADOO, J.

This appeal is directed against the judgment of conviction and order of sentence dated 29th April 1999 passed by the Sessions Judge, Raipur in S.T. No.192/98 whereby learned Sessions Judge after holding the accused/ appellant guilty for commission of offence under Section 302 of the I.P.C. for committing murder of Mohan Soni, sentenced him to undergo imprisonment for life.

The case of the prosecution, in brief, is that in the intervening night of 7th/8th April 1998 deceased Mohan Soni, accused Bablu @ Mahesh Jain along with witnesses PW-5 Shiv @ Shatrughan, PW-16 Bharat Lal Yadav & Gopi Yadav (since deceased) were roaming in the hotels in front of Railway Station Tilda and they consumed liquor also at two places. Ultimately, in the mid night, witnesses Shiv @ Shatrughan, Bharat Lal Yadav and 3rd associate Gopi Yadav left for their residence, the accused and the deceased also left the place for other side. When the accused and deceased Mohan Soni were going towards petrol pump that raised suspicion in the mind of the witnesses as to why they are going to that side, therefore, they also followed them. However, after some distance, they saw that the accused and the deceased started quarrelling near Sasaholi Railway Crossing where mercury light was

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —2—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

burning. They saw that the accused, in the first instance, slapped deceased Mohan Soni and when he fell down, he attacked with a stone on the head of the deceased 4-5 times, as a result of which he sustained fatal injury on the head, occipital and parietal bones were fractured. Next day morning, Abhaydas, Kotwar of village Sasaholi saw the body of Mohan Soni on one side of the road which was between Sasaholi Railway Crossing and Saurabh Petrol Pump. Amritlal, owner of the hotel Ambu identified the body of Mohan Soni as his servant. On this, Abhaydas gave a merg intimation (Ex.-P/1) on 8-4-98 at about 9 a.m. in the Police Station Nevra.

The Investigating Officer immediately left for the scene of occurrence, after giving notice Ex.-P/2 to the Panchas, prepared Panchanama (Ex.-P/3) of the dead body of the deceased. The Investigating Officer took into possession one pair of sleepers, plain soil & blood stained soil and one blood stained stone weighing about 4-5 kg from the place of occurrence under Ex.-P/5. Clothes of the accused were taken into possession under Ex.-P/6. The Executive Magistrate conducted identification parade of accused Bablu in which witness Shiv identified the accused of which memo Ex.-P/7 was prepared. Another identification parade was conducted by the same Executive Magistrate of the accused in which witness Bharat identified the accused of which report Ex.-P/10 was prepared. The dead body of the deceased was sent for postmortem examination to the Government Hospital, Tilda under Ex.-P/8 where Dr. Meena Samual, Assistant Surgeon, conducted the postmortem, prepared the report Ex.-P/30, and opined that cause of death is due to severe haemorrhage as a result of head injury. It was noticed that there were multiple lacerated wounds in the size of 2" to 1" in length, 1" to 1/2" in depth and 1/4th" in breadth all over the head placed on occipital bone, temporal bone and mastoid bone. Right occipital bone was found

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -3-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

fractured. There were 6 lacerated wounds on the head. Smell of alcohol was present in the stomach.

Thereafter, First Information Report Ex.-P/33 under Section 302 of the I.P.C. was registered. The accused was also medically examined by PW-18 Dr. A.A. Siddique and as per the report, abrasions were found on the left shoulder, on right forearm and over right posteriolateral upper part of elbow. There was cut wound on the index finger of the right hand. There was cut wound on the middle finger of right hand. After examination, injury report Ex.-P/31 was prepared. Recovered articles were sent for chemical examination to the Forensic Science Laboratory from where reports Ex.-P/39, P/40, and 41 were received. Site plan Ex.-P/4 was prepared by Halka Patwari.

After completion of the investigation, charge sheet was filed in the Court of Judicial Magistrate 1st Class, Raipur, who in turn, committed the case to the Sessions Judge, Raipur.

The prosecution in order to establish the charge against the accused examined 19 witnesses. On the other hand, statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the material appearing against him in the prosecution evidence. Even he denied the seizure of his clothes and stated that he was at the hotel at Bhatapara. Deceased Mohan Soni and his brother used to work at his uncle's hotel and he has been falsely implicated in the crime.

Learned Sessions Judge after hearing arguments of Public Prosecutor and counsel for the accused convicted and sentenced the accused as mentioned in para-1 of this judgment.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -4-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

We have heard Shri S.L. Bajaj, Advocate appointed by the High Court Legal Aid Committee on behalf of the accused/appellant and Shri U.N.S. Deo, Additional Public Prosecutor with Shri G.D. Vasvani, Govt. Advocate for the State/respondent.

As far as homicidal death of deceased Mohan Soni is concerned, learned counsel for the accused/appellant argued that PW-17 Dr. Meena Samual has stated in her evidence that the death of deceased Mohan Soni may be homicidal, therefore, the prosecution has not been able to establish that the death of deceased Mohan Soni was homicidal.

But, perusal of the record reveals that arguments advanced by learned counsel for the accused/appellant is devoid of merit for the reason that as per the evidence of PW-17 Dr. Meena Samual, occipital and parietal bones were found fractured and there were lacerated wounds over occipital, parietal ~~and mastoid bones~~ areaa. She has stated that the death was due to haemorrhage and excessive bleeding. It is possible that the death was homicidal and injuries were ante-mortem in nature. If we examine the evidence of PW-5 Shiv @ Shatrughan and PW-16 Bharat, who witnessed the crime in question, they have stated that the accused attacked the deceased on his head with a stone, as a result of which he received 6 lacerated wounds on the head, parietal and occipital bones were fractured. The head is vital organ and the manner in which injuries were sustained by the deceased, we have no manner of doubt that in view of the nature of injuries sustained by the deceased and looking to the ocular evidence as well as medical evidence, death of deceased Mohan Soni was homicidal in nature.

As far as involvement of the accused/appellant in the crime in question is concerned, conviction primarily rests on the ocular evidence of

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -5-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

eyewitnesses namely PW-5 Shiv @ Shatrughan and PW-16 Bharat. They have categorically stated that in the fateful night, they along with one Gopi Yadav (since deceased), accused and the deceased consumed liquor in two spells and thereafter at about 11.15 in the night, PW-5 Shiv @ Shatrughan, PW-16 Bharat and Gopi left the place together whereas, the deceased and the accused left together to another side. When they saw that the deceased and the accused were going towards the wrong side, in order to know as to where they are going, they turned and started following them. After some distance, in the mercury light they saw that the deceased and the accused started quarrelling and in that process, the accused slapped the deceased, when he fell down, the accused picked up a stone and attacked the deceased on his head with that stone 4-5 times. Being frightened, they left the scene of occurrence.

Learned counsel for the accused/appellant submitted that these two witnesses are cooked up witnesses. In fact, they had not witnessed the incident for the following reasons:-

(1) that as a natural consequence when these witnesses, accused and the deceased consumed liquor together, when they saw that the accused was attacking the deceased, in the ordinary course, they ought to have intervened and tried to save the deceased;

(2) Witness PW-16 Bharat, who was employee of PW-9 Ramesh, as he was working at the hotel of Ramesh, next day when he came on duty, he did not disclose about the incident to him.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -6-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Learned counsel for the appellant further argued that in the map Ex.-P/4 prepared by Patwari, it has not been indicated that from which place witnesses saw the incident and looking to the distance from where witnesses are said to have witnessed the crime, it was not possible for them to witness the incident.

(3) the incident is said to have been occurred in the intervening night of 7th/8th April 1998 whereas, statements of these witnesses under Section 161 of the Cr.P.C. were recorded only on 17-4-98 by the I.O., therefore, evidence of these witnesses cannot be believed.

On the other hand, learned counsel for the State/respondent supported the judgment of the trial Court.

Having heard learned counsel for the parties, we have perused the record of the trial Court.

As far as first point raised that why these witnesses had not intervened and tried to save the deceased is concerned, PW-5 Shiv @ Shatrughan has categorically stated in the examination-in-chief that after seeing the incident, he along with Bharat came to their house and next day morning, he came to know about the death of deceased Mohan Soni. In the cross-examination, he has stated that it is wrong to say that he has not witnessed the crime. He did not go to the Police Station on account of fear. But, in cross-examination, no question was put to this witness as to why they did not intervene when the accused was assaulting the deceased. PW-16 Bharat has stated that first the accused slapped the deceased, as a result of which the deceased fell down on the earth and thereafter, the accused

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -7-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

attacked on his head with a stone 4-5 times, as a result of which the deceased died on the spot. This witness has not been cross-examined on the point that as to why they had not intervened.

Now, question comes that why they had not intervened when they consumed liquor together. It is difficult to say anything about a person as to in particular circumstances how he will behave, no hard and fast formula can be laid down that a particular person will always behave in a particular manner, in particular situation. It varies from person to person depending upon the nature of a person and also circumstances. As PW-5 Shiv @ Shatrughan has stated that when they saw that the accused was attacking the deceased, they left for their residence, therefore, merely on this ground that these witnesses had not intervened, it cannot be said that they did not witness the crime, of-course, in order to ascertain their presence at the scene of occurrence, their evidence has to be scrutinized with more care and circumspection. Their presence on the scene cannot be doubted for the reason that in the first instance, in their cross-examination, there is nothing to show that on account of any animosity or bias, they have deposed against the accused person. Moreover, they have stated that the deceased, accused and these witnesses consumed liquor together and this fact stands substantiated by the fact that the postmortem report of the deceased indicates consumption of liquor by the deceased. Moreover, PW-9 Ramesh, who is the owner of hotel of witness PW-16 Bharat, in last para of cross-examination, has categorically stated that when Bharat did not disclose to him, he himself enquired from him that yesterday night they were consuming liquor, therefore, he may have murdered the deceased. He disclosed this fact to the Police also. Therefore, consumption of liquor together by the deceased, accused and these witnesses has further been established by the

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -8-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

evidence of PW-9 Ramesh. In this connection, as far as judgment cited by learned counsel for the accused/appellant in the matter of **Mohan Singh V. Prem Singh and another** reported in **2003 CRI. L.J. 11** is concerned, principle laid down in para-24 of the judgment is distinguishable on facts because conduct of the witnesses was not believed by the Apex Court, looking to the other aspects of the case apart from their unnatural conduct, not intervened in the incident.

As far as the question as to why PW-16 Bharat and PW-5 Shiv @ Shatrughan did not disclose this fact to anyone is concerned, PW-9 Ramesh, owner of the hotel where witness Bharat was working, has stated that next day morning when Bharat came to his hotel, he did not disclose about the incident. He himself enquired from Bharat that previous night this witness along with accused, deceased and other persons were consuming liquor together, therefore, he may have committed the crime. As the incident was of the mid night, these witnesses left for their residence, these witnesses had also consumed liquor with the deceased and the accused, possibility cannot be ruled out that out of fear these witnesses had not disclosed this fact to anyone and also as these persons were in drunken condition which might be the cause for not disclosing the incident to anyone. Moreover, in the cross-examination of these witnesses, it has not been specifically asked for as to why they had not disclosed this fact immediately to the police. Their presence on the scene of occurrence cannot be doubted because as per their evidence, they consumed liquor together with the accused & deceased, and fact of consumption of liquor has been corroborated by the fact that the doctor who conducted postmortem found the smell of liquor in the stomach of the deceased. In the viscera report, contents of alcohol has also been found.

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There is no cross-examination on this aspect that why these persons will unnecessary implicate the accused in such a heinous crime without any rhyme or reason. Moreover, involvement of the accused in crime is established from the fact that he himself sustained several abrasions on various parts of the body i.e. left shoulder, right forearm and fingers as per medical report Ex.-P/31 prepared by PW-18 Dr. Siddique after the examination of the accused, that examination was conducted on 11-4-98 and it has been mentioned in the report that injuries were 3-4 days old and the incident was of intervening night of 7th/8th April 1998, therefore, injuries on the body of the accused further establish his involvement in the crime. Therefore, looking to the totality of the circumstances and evidence available on record, presence of these witnesses cannot be doubted on the scene of occurrence and their evidence inspire confidence of the Court.

As far as the question, that these witnesses were not able to see the incident as there was dark night and from where they saw the incident, it was not possible for them to witnesses the crime. In the first instance, case of the prosecution and evidence of these witnesses is that the accused was assaulting the deceased at a place where mercury light was on, therefore, it was possible for these witnesses to witness the crime in the mercury light. Moreover, no specific question has been put to these witnesses that looking to the distance from where they are said to have been witnessed the crime, it was not possible for them to witness the crime, therefore, we do not find any substance in this argument also.

Coming to the points raised by learned counsel for the accused/ appellant that Patwari, who prepared the site plan Ex.-P/4, in the said site plan it has not been shown from where these witnesses had witnessed the crime. It is true that Patwari who prepared the site plan has not shown the

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आदेश पत्रक (पूर्वानुबद्ध)

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place from where these witnesses witnessed the crime. Patwari has been examined as PW-10, who has stated that he prepared the site plan on 10-4-98. He has stated that he prepared the site plan after enquiring from the Kotwar. The site plan was not prepared after ascertaining from the witnesses as to from which place they had witnessed the crime. Therefore, we are of the considered opinion that looking to the totality of the circumstances of the case and evidence available on record, merely not showing the place from where witnesses witnessed the crime does not affect the prosecution case.

As far as late examination of the witnesses by the I.O. i.e. about 10 days after the incident is concerned, the question of delay in examining a witness during investigation is material only if it is indicative and suggestive of some unfair practice adopted by I.O. with a view to introduce a cooked up witness to falsely support the prosecution case. Evidence of a witness does not become untrustworthy merely because there was delay in recording his statement. The evidence of PW-5 Shiv @ Shatrughan and PW-16 Bharat discloses that they along with accused and the deceased consumed liquor and their evidence to that effect is clear, cogent, convincing and truthful from the fact that the accused himself received injuries in the incident as per the report Ex.-P/31. Even smell of liquor was found in the stomach of the deceased as per the postmortem report. Moreover, these witnesses have not been cross-examined on the aspect of delay in examination of the witnesses, therefore, in the totality of the circumstances, we are of the considered opinion that 10 days' delay in examining these witnesses does not affect the prosecution case. Mere delay in examination of a witness cannot in all cases be termed to be fatal. There may be several reasons. The Court can act on the testimony of witnesses if it is found to be cogent and credible. Unless the investigating officer is categorically asked as to why there was delay in

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —11—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion. On the other hand, if the explanation is found to be implausible, certainly the Court can consider it to be one of the factors to affect credibility of the witnesses who were examined belatedly. The said principle has been laid down by the Apex Court in the matter of **State of U.P. Vs. Satish** reported in **(2005) 3 SCC 114.**

For the foregoing reasons, looking to the medical examination of the accused, postmortem report of the deceased and other record, we are of the considered opinion that the evidence of PW-5 Shiv @ Shatrughan and PW-16 Bharat inspire confidence of the Court. We have not been able to notice any infirmity in their evidence regarding witnessing of crime by them, as such we do not find any illegality or infirmity in the judgment of the trial Court regarding involvement of the accused in crime in question.

In the last, learned counsel for the accused/appellant argued that from the facts of the case, it is established that quarrel took place all of a sudden, the accused, deceased & witnesses were on friendly terms and there was no animosity. They consumed liquor together, however, unfortunately, the accused and the deceased were in drunken condition and all of a sudden, some quarrel ensued and on a trivial matter, the accused, all of a sudden, picked up a stone and attacked the deceased, therefore, case of the accused falls within Exception IV of Section 300 of the I.P.C..

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -12-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

In order to appreciate arguments advanced by learned counsel for the accused/appellant, we have perused the evidence. There is ample evidence on record. Even the prosecution witnesses in their examination-in-chief have stated that the accused, deceased and witnesses consumed liquor together in two spells and at about 11.15 in the night they set apart, the accused and the deceased left for one side, when they were going at the place of occurrence, all of a sudden, they started quarrelling, in that quarrel, the accused first slapped the deceased and when he fell down, the accused picked up a stone and attacked on his head. Injury report of accused Ex.-P/31 shows that he sustained abrasions on various parts of the body, therefore, this fact further strengthens that there was scuffle between the deceased and the accused, as there was sudden quarrel, without any preparation or pre-meditation and in a heat of passion, the accused picked up a stone and attacked the deceased, the accused had not acted in unusual or cruel manner, as such, case of the accused is covered under Exception IV to Section 300 of the I.P.C., therefore, conviction of the accused under Section 302 of the I.P.C. and sentence imposed upon him under that Section cannot be sustained.

In the result, the appeal partly succeeds, while setting aside conviction and sentence imposed upon the accused/appellant under Section 302 of the I.P.C. He is convicted under Section 304 Part II of the I.P.C. and sentenced to undergo R.I. for 8 years. It is stated that the accused is in detention since 11-4-98 as per arrest memo Ex.-P/43, thereby the accused is in custody for about 8 years 4 months, as such, he has already undergone the sentence, therefore, he be set at liberty forthwith, if not required in any other case.

Barve

Sd/-
L.C. Bhadoo
Judge

Sd/-
V.K. Shrivatava
Judge